RECEIVED

APR 17 1997
DOCKET FILE COPY ORIGINAL
Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Replacement of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

COMMENTS OF METROCALL, INC.

Frederick M. Joyce
Christine McLaughlin
Its Attorneys

JOYCE & JACOBS, Attys. at Law, LLP
1019 19th Street, N.W.
14th Floor, PH-2
Washington, D.C. 20036
(202) 457-0100

Date: April 17, 1997

TABLE OF CONTENTS

SUMMARY i

I. Statement of Interest 1

II. Summary of FNPRM 2

III. No Additional Coverage Requirements Should be Imposed on Nationwide Licensees . . 3

A. Nationwide Licensees Were Already Subject to Coverage Requirements, and Have Met Them 3

B. The Imposition of Additional Nationwide Coverage Would Unlawfully Modify Existing Nationwide Licenses 5

C. The FCC's Proposal Would Constitute Unlawful Retroactive Rulemaking 7

IV. Shared Frequency Operators Must be Afforded Interference Protection 10

V. The FCC Should Adopt Specific Procedures for Shared Channels to Deter Application Fraud 12

A. Applicants Should be Required to Show Need for a Paging License. 12

B. Disclosure of Real Parties-In-Interest 14

C. The FCC Should Enforce Public Interest Statement Requirements 15

D. Financial Qualification Requirements 16

E. Antenna Site Availability Requirements 17

F. Application Certification Requirements 18

VI. Partitioning and Disaggregation 20

A. Partitioning by Nationwide Licensees 20

B. Coverage and Payment Requirements for Partitioned Licenses 21

C. License Term for Partitioned Licenses 23

D. Disaggregation 23

CONCLUSION 24

EXHIBIT ONE

SUMMARY

The FCC should not impose further coverage requirements on nationwide paging licensees. In order to attain "nationwide" status, those licensees were obligated under the prior Rules to meet substantial coverage requirements; they have done so. Imposing additional requirements will merely increase the economic and operational burdens on nationwide licensees, without countervailing public interest benefits. Because those licensees have complied with all conditions to their nationwide grants, their nationwide licenses have been perfected. The FCC's proposal would unlawfully modify existing nationwide licenses by depriving licensees of the status they have earned. Additionally, the retroactive application of coverage requirements to operational systems does not meet the judicially-articulated standards for retroactive rulemaking. Here, the harm of imposing substantial additional costs on licensees outweighs any benefit of doing so.

The FCC should expeditiously adopt some form of exclusivity on the shared PCP channels. These licensees have also made significant investments in providing paging services and maintained their stations in good faith; the FCC has an obligation to protect them, and their subscribers, from ruinous interference.

To prevent fraud in shared channel licensing, Metrocall suggests a number of options. For example, it is fundamental that an applicant must have a need for the requested facilities; a specific requirement of demonstrating need should be incorporated into the Rules. All applicants should be required to provide detailed disclosures of the real parties-in-interest to their applications; the existing requirements of such disclosures should be strengthened and enforced. The Part 22 requirement of including public interest statements in applications should be

incorporated into Part 90. Although those statements are often "boilerplate," they may be helpful in raising "red flags" in an application that warrant further FCC inquiry. Additionally, applicants are implicitly required to have the requisite financial qualifications to construct and operate their proposed stations, and to have reasonable assurances of the availability of their proposed sites. The FCC could make financial and site availability showings explicit application requirements; in the alternative, the FCC's staff could send out standard letters to applicants requesting such financial and/or site availability showings. Metrocall doubts that the FCC's proposed certification requirements will deter application mills; those requirements are more likely to have a chilling effect on the relations between legitimate applicants and their consultants.

Nationwide licensees should be permitted to partition their service areas in the same way as other paging licensees. The benefits of partitioning will be realized regardless of the size of the partitioner's service area. Moreover, partitioning is much like the partial assignment procedure already permitted for other incumbent paging licensees; there is no persuasive reason to treat nationwide licensees differently.

All partitionees should be subject to the three and five-year coverage benchmarks for their partitioned service areas. Partitionees should be permitted to assume a portion of the partitioner's installment payment obligations, but the Rules should be crafted to ensure that a party to a partitioning arrangement that meets its coverage and payment requirements is not prejudiced by the other party's default. Partitionees should be licensed for the remainder of the partitioner's license term, and be granted renewal expectancies on the same grounds as other paging licensees. Disaggregation of paging channels does not appear to be feasible; however, the FCC should retain discretion to review disaggregation requests on a case-by-case basis.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

COMMENTS OF METROCALL, INC.

Metrocall, Inc. ("Metrocall"), by its attorneys and pursuant to Sections 1.415 and 1.421 of the Commission's Rules, 47 C.F.R. §§ 1.415; 1.421, hereby submits its Comments in response to the "Further Notice of Proposed Rule Making" ("FNPRM") in the above-captioned rule making proceeding.[1]

I. Statement of Interest

Metrocall is one of the largest paging companies in the nation. Metrocall previously filed Comments in this radio-paging rule making proceeding with respect to the FCC's "Interim Licensing" proposal, and with respect to the wide-area licensing/auction proposal itself. Metrocall also sought clarification or partial reconsideration of the First Report and Order in this proceeding, as well as of the Second Report and Order in this proceeding, which was adopted

[1] The FNPRM was published in the Federal Register on March 12, 1997; and established a comment deadline of April 17, 1997. See 62 Fed. Reg. 11638. The Second Report and Order and Further Notice of Proposed Rule Making were released in a single document, FCC 97-59. The respective portions of that document are herein referred to separately as the Second Report and Order and the FNPRM.

concurrently with the FNPRM.[2] Moreover, as the licensee of two nationwide 929 MHz systems and of a wide-area network on the shared 152.48 MHz frequency, Metrocall is uniquely situated to comment on the FNPRM's proposals for nationwide and shared channel paging. Consequently, Metrocall is an "interested party" in these proceedings.

II. Summary of FNPRM

The FNPRM sought comment on whether additional coverage requirements should be imposed upon the nationwide licensees identified in the Second Report and Order portion of the subject release, beyond those already required to qualify for exclusivity. See FNPRM at ¶ 202. If so, the FCC questioned the appropriate coverage area. Id.

The FNPRM also sought comment as to whether nationwide licensees should be able to partition their licenses. Id. at ¶ 203. With regard to partitioning by licensees awarded authorizations for Major Trading Areas ("MTAs") and Economic Areas ("EAs"), the FCC sought comment on the rules to apply if those licensees obtained benefits in the competitive bidding process (*i.e.*, bidding credits and installment payments) for which the proposed partitionee did not qualify. Id. at ¶¶ 205-207. Additionally, the FCC questioned whether each party to a partitioning agreement should be required to guarantee all or part of the original MTA/EA licensee's monetary obligations, id. at ¶ 208; and what coverage requirements should apply to partitioned service areas. Id. at ¶¶ 209-210. Finally, the FCC tentatively proposed to award partitioned licenses for the remainder of the partitioner's license term, and to afford partitionees renewal expectancies for their service areas. Id. at ¶ 211.

---

[2] Metrocall has also asked for a stay of the Second Report and Order pending review of its Petition for Reconsideration.

The FNPRM also sought comment on whether spectrum disaggregation is feasible for paging and if so, the rules that should apply to disaggregation. Id. at ¶¶ 212-217. If disaggregation is allowed, the FNPRM requested comment as to whether combined partitioning and disaggregation should be permitted. Id. at ¶ 218.

Lastly, the FNPRM sought comment regarding methods to reduce or eliminate "application mill" fraud on the shared Part 90 paging frequencies. Id. at ¶¶ 219-220.

III. No Additional Coverage Requirements Should be Imposed on Nationwide Licensees.

Metrocall strongly objects to the FCC's proposal to impose additional coverage requirements on nationwide licensees. Those licensees have already met substantial build-out requirements, and expended considerable sums of money in meeting the FCC's prior rule provisions. The imposition of additional construction requirements would unlawfully modify those licenses; unlawfully impose a retroactive rule that would severely harm existing licensees; and would be fundamentally unfair.

A. Nationwide Licensees Were Already Subject to Coverage Requirements, and Have Met Them.

In order to obtain nationwide exclusivity on a 929 MHz frequency, a licensee was required to construct 300 or more transmitters in the continental United States, Alaska, Hawaii, and Puerto Rico. The licensee was further required to provide service to at least 50 of the markets listed in Section 90.741 of the Commission's Rules, including 25 of the top 50 markets, and to two markets in each of seven regions modeled on the RBOC regions. See 47 C.F.R. § 90.495 (a)(3). More than minimal construction was required: each transmitter was required to be capable of at least 100 watts output power, and have simulcast capability. See 47 C.F.R. §

90.495(a)(4). Frequency-agile transmitters could be counted no more than once for exclusivity purposes; a licensee seeking to qualify for exclusivity on a second frequency was required to construct twice the number of transmitters required to obtain exclusivity on a single frequency. See 47 C.F.R. § 90.495(a)(5). Pursuant to these rule provisions, Metrocall has constructed and is operating over 1,100 transmitters throughout the United States on two exclusive, nationwide 929 MHz frequencies, and continues to expand its nationwide systems.

Licensees on the nationwide 931 MHz frequencies were likewise subject to significant build-out requirements: such licensees were required to construct stations in at least 15 Standard Metropolitan Statistical Areas ("SMSAs") within one year of grant, and to institute nationwide service within two years from the initiation of service. See Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, *Memorandum Opinion & Order on Reconsideration*, 93 FCC 2d. 908, ¶ 26 (1983) ("Nationwide Paging Order").

The Commission has previously recognized the substantial costs attendant to establishing a nationwide paging network. See, *e.g.*, Amendment to the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, 8 FCC Rcd. 8318, ¶ 14 (1993) ("PCP Exclusivity Order") ("the capital investment required to construct nationwide systems will be sufficient to discourage attempts to warehouse nationwide paging frequencies"). Moreover, the construction requirements for nationwide systems were specifically designed to "ensure comprehensive nationwide service[.]" Id. Consequently, the recognized nationwide licensees have already met the FCC's legitimate goal of instituting

network paging services throughout the nation. As the FCC itself acknowledged, on the same day it adopted the FNPRM: "[I]t would not serve the public interest or be fair to take away the exclusivity rights that these licensees earned before the commencement of this proceeding. The record indicates that they have developed successful and efficient nationwide networks under the pre-existing rules -- in fact, in most cases they have substantially exceeded the construction thresholds required to earn nationwide exclusivity under those rules." See Second Report and Order at ¶ 50.

Additional coverage requirements will simply place unnecessary economic burdens on the very licensees whom the FCC has praised for their efficiency and success in providing paging services throughout the entire United States. The FCC should decline to set a precedent of punishing licensees for their efforts, and should refuse to adopt further coverage requirements for nationwide licensees.

B. The Imposition of Additional Nationwide Coverage Would Unlawfully Modify Existing Nationwide Licenses.

As with all Commission licensees, nationwide licensees accepted their authorizations subject to certain conditions imposed by the FCC's Rules. The primary condition was the obligation to complete construction in accordance with the respective Rules and policies for nationwide systems on 929 MHz and 931 MHz frequencies. The licensees listed on the FCC's May 10, 1996 Public Notice, and those additional licensees deemed "nationwide" in the Second Report & Order in this proceeding, fully complied with those conditions. Having met those conditions, these nationwide licenses cannot now be modified by the FCC, after the fact, through the imposition of additional construction obligations.

It is well-settled that "[n]o station that has been operated in good faith should be

subjected to a change of frequency or to a reduction of its normal and established service area, except for compelling reasons." Journal Company v. Federal Radio Commission, 48 F.2d 461, 463 (D.C.Cir. 1931). "[T]he right under a license for a definite term to conduct a broadcasting business requiring - as it does - a substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury." L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C.Cir. 1948).

Section 316 of the Communications Act of 1934, as amended (the "Act"), provides that a licensee whose license is to be modified by the Commission must be given an opportunity to protest that modification. See 47 U.S.C. § 316(a). Courts have long held that "a license is modified for purposes of Section 316 when an unconditional right conferred by the license is substantially affected." See, *e.g.*, P&R Temmer, d/b/a, Mobile Communications Service Company v. FCC, 743 F.2d 918, 927-928 (D.C.Cir. 1984). While no "right" vests in a licensee who has failed to meet conditions imposed upon an authorization by the FCC's Rules or the instrument of authorization, id. at 928; a licensee who *has* met those conditions and is providing service to the public does have rights in its authorization that may not be disregarded. See, *e.g.*, Journal Company, *supra*, 48 F.2d at 463 (where a radio station has been "constructed and maintained in good faith, it is in the interest of the public and the common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons").

The Commission's proposed action here would have the effect of unlawfully modifying existing nationwide paging authorizations. Metrocall and the other affected nationwide licensees have complied with the conditions imposed on their nationwide grants; under the Act and the

FCC's Rules, these licensees have "an unconditional right" to nationwide exclusivity on their frequencies which would be "substantially affected" by additional coverage requirements. The FCC's proposal would require licensees who have already incurred substantial costs in building out their systems to incur further costs, or risk losing much (if not all) of the significant investments they previously made. To deprive these licensees of the benefit of their nationwide status, after they have met all conditions to that status, requires "compelling reasons," which do not exist here, See Journal Co., *supra*; and the procedural protections of Section 316 of the Act and longstanding precedent. See, *e.g.*, Western Broadcasting Company v. FCC, 674 F.2d 44 (D.C.Cir. 1982) (discussing the nature of the hearing required under Section 316); cf., NBC v. FCC, 362 F.2d 946 (D.C.Cir. 1966) (rule making proceeding that "included much more exhaustive and extensive hearings than would be required under either Section 309 or 316" accorded modified licensee its right to be heard).

C. The FCC's Proposal Would Constitute Unlawful Retroactive Rulemaking.

While the FCC may adopt new rules, giving new rules retroactive effect is an extraordinary measure, and one that has often been frowned upon by the courts. See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745 (D.C.Cir. 1986). In order to adopt a rule which would retroactively impose new construction requirements on licensees who have already complied with the existing requirements, the FCC must balance the mischief of retroactive application with the harm of undermining the new rules that would occur otherwise. See, id. at 746; McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1365 (D.C.Cir. 1993) ("McElroy I"). The balance of harms here weighs against the imposition of any further coverage requirements on nationwide licensees.

The FCC's proposed coverage requirements would have an obvious retroactive effect: the affected licensees were awarded nationwide authorizations on their respective frequencies, conditioned upon their meeting certain construction and coverage rules. The licensees have met those construction and coverage rules, and have thus perfected their nationwide grants. Adoption of further coverage requirements would return those previously-perfected authorizations to a conditional state.

Licensees would clearly be harmed by such a divestiture of their existing status. After having expended significant time, money and resources to building out nationwide networks and providing nationwide services to subscribers, the nationwide licensees would be forced to incur further expenses in meeting new requirements. Those additional construction, site lease and other expenses would not be incurred because of subscriber demand or sound network management, but because of regulatory fiat.

Such an approach would impose substantial burdens on licensees, without countervailing public interest benefits. Rather, such an approach substitutes the Commission's judgment for that of the marketplace -- an approach this Commission has frequently (and wisely) eschewed. See, *e.g.*, Second Report and Order at ¶ 4 (FCC's goal in revising paging Rules to achieve similarity with Rules for competing services was to ensure "that competitive success is dictated by the marketplace, rather than by regulatory distinctions"); Report and Order in GN Docket No. 96-228, FCC 97-50, ¶ 112 (released February 19, 1997) (adopting liberal construction requirements for Wireless Communications Service, that are compatible with Rules allowing licensees flexibility to provide a wide range of services); Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rule Making in CC Docket No. 92-297, FCC 97-

82, ¶¶ 267-268 (adopting similar liberal construction rules for Local Multipoint Distribution Services, for same reasons concerning flexibility of service offerings). Indeed, the FCC's sole justification for even considering to impose these additional coverage requirements on nationwide licensees appears to be nothing more than "regulatory symmetry" with future paging licensees. See FNPRM at ¶ 202. But the mere fact that prospective, unconstructed paging stations will be regulated in one way, in no way justifies imposing those construction regulations retroactively on operational paging systems.

As the Commission stated in adopting its exclusivity rules for PCP services, "licensees who meet [the nationwide exclusivity] criteria do not require more intrusive regulation to ensure that they provide service where the need exists ... in today's highly competitive paging market, customer demand will provide sufficient incentive for nationwide licensees to eliminate gaps in their coverage." See PCP Exclusivity Order at ¶ 14. In addition to the three 931 MHz nationwide licenses, eleven separate entities hold nationwide 929 MHz licenses on 23 frequencies, see *Public Notice*, DA 96-748 (released May 10, 1996) and Second Report and Order at ¶¶ 50-52. Competition among them will ensure the responsiveness of each nationwide licensee to the public's needs.

In short, the resources required to comply with government-imposed coverage benchmarks would be better directed toward maintaining and expanding high-quality, competitively priced paging services in the areas desired by the public. Absent a genuine and significant public interest benefit to be derived from retroactively revising the nationwide construction criteria, that retroactive rule making is unlawful, and unsound policy.

IV. Shared Frequency Operators Must be Afforded Interference Protection.

Metrocall (through its wholly-owned subsidiary A+ Network) and other shared frequency licensees went to great lengths in this rule making proceeding to explain the critical importance of adopting some form of interference and/or exclusivity protection for shared frequency licensees. Metrocall explained that these issues must be addressed *at the same time* that the FCC implemented such rules for "exclusive use" paging channels, otherwise, the FCC would be heightening the potential for harm to "unfrozen", "unauctionable" shared channels. (A+ Network Comments at pp. 4-6).

Metrocall's broader concern here is that the FCC has lifted the "freeze" on shared frequencies, without even attempting to address the interference and congestion problems that Metrocall and others previously brought to this agency's attention, in detail, in their prior comments. Before the FCC can even consider licensing additional carriers on these already congested shared-use frequencies, it has a statutory duty to ensure that its additional licensing schemes do not injure incumbent licensees and their hundreds of thousands of subscribers. Metrocall submits that the record and the FCC's statutory obligations amply support immediate rule making action on these issues.

One of the FCC's primary responsibilities is to "prevent interference between stations." See 47 U.S.C. § 303(f). It was settled long ago in Journal Company v. Federal Radio Commission, 48 F.2d at 463, that where a radio station "has been constructed and maintained in good faith, it is in the interests of the public and the common justice to the owner of the station that its status should not be injuriously affected, except for compelling reasons."

The D.C. Circuit Court of Appeals thus laid the foundation for subsequent FCC licensing

decisions in the public interest: "No station that has been operated in good faith should be subjected to a change of frequency or to a reduction of its normal and established service area, except for compelling reasons." Id. at 463. That Court succinctly stated that prevention of harmful interference runs to the very heart of the Communications Act: "The purpose of this regulation obviously is to prevent chaos and to insure satisfactory service" particularly since the "installation and maintenance" of radio stations "involve a very considerable expense." Id.

These fundamental statutory considerations -- the protection of incumbent paging licensees against harmful interference, the avoidance of "chaos" in the licensing of paging stations, and the protection of the considerable sums of money and labor that have been invested in these paging systems -- were clearly presented to the FCC in this rule making proceeding. Any further delays in addressing these issues will likely lead to harmful interference and perhaps irreparable damage to incumbent shared frequency licensees.

The FCC ought to immediately adopt some form of shared frequency interference rules, and provide shared frequency licensees with some form of exclusivity protection, should they wish to obtain it. The "congested" nature of those frequencies provides greater, not lesser, support for such protection. Cf. Second Report and Order at ¶ 40. Most Part 90 private radio channels are heavily utilized; but, that did not deter the FCC in its "Refarming Docket" from adopting rules and procedures that would allow licensees some form of exclusive use rights. See Second Report & Order in PR Docket No. 92-235, FCC 97-61, ¶ 59 (released March 12, 1997). There, the FCC adopted Rules to permit licensees on shared private radio channels to trunk their systems; if existing licensees on a shared channel agree to do so, no additional parties will be licensed on that channel without the consent of the incumbents. Id.

Shared frequency PCP licensees face essentially the same interference and capacity problems as do these other Part 90 licensees; they are entitled to the best possible interference and channel capacity protection that can be crafted given the existing characteristics of these channels. See Garrett v. FCC, 513 F.2d 1056, 1060 (D.C.Cir. 1975); Melody Music, Inc. v. FCC, 345 F.2d 730, 732-33 (D.C.Cir. 1965) (FCC is obligated to treat similar parties similarly).

V. The FCC Should Adopt Specific Procedures for Shared Channels to Deter Application Fraud.

Metrocall has an unfortunate amount of experience with fraudulent and speculative applications. Many speculative Part 22 paging applications have been filed over the past two to three years on paging channels which are used predominantly by Metrocall throughout the United States. Metrocall has previously suggested to the FCC that a more strict enforcement of its existing rules and statutory obligations would go far in deterring speculative applications. Those suggestions, and others, are explained in greater detail below.

A. Applicants Should be Required to Show Need for a Paging License.

It is fundamental under the Act that an applicant must be able to establish need for a license to use scarce radio spectrum. See 47 U.S.C. §151; see also, A.F&L Telephone, FCC mimeo 81-112 (March 21, 1981), attached hereto as Exhibit One, for the Commission's convenience. Part 22 of the Rules reiterates this requirement; PMS applicants must specifically state the reasons why a grant of a proposed application would serve the public interest, convenience and necessity. See 47 C.F.R. § 22.107(b).

The FCC could substantially cut down on the number of speculative applications in the shared-frequency bands by reasserting these statutory requirements, and incorporating them into all of its paging rules. For example, section 22.139 of the Rules expressly states the

Commission's prohibition on speculative filings: "Carriers must not obtain or attempt to obtain an authorization in the Public Mobile services for the principal purpose of speculation or profitable resale of the authorization, but rather for the provision of common carrier telecommunication services to the public." See In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 FCC Rcd. 6513 (1994) ("Report & Order"). In that Report & Order, the FCC explained that the policy behind the Rule is to put parties on notice that any application may be reviewed to determine if the circumstances indicate trafficking in Public Mobile Services authorizations, and that the Commission may require parties to submit information demonstrating that they are not speculating in authorizations. Id. at ¶A-17.

Metrocall submits that the FCC should adopt a comparable rule for Part 90 paging services, and routinely require all shared frequency applicants to aver, under penalty of perjury, that their application has been filed with the intention of building and operating a paging station, not to "profit in the resale" of an FCC license. The FCC could also issue a standard form letter in response to new shared frequency applications, reminding applicants of the potential penalties for violations of the FCC's Rules against speculative filings, thereby affording speculative applicants an opportunity to dismiss their applications without penalty.

Under Part 22 of the Rules, applicants were once expressly required to demonstrate "need" for a license. See e.g. David R. Williams d/b/a Industrial Communications 53 RR 2d 38 (1983) aff'd. 721 F.2d 1424 (D.C. Cir. 1983) (the FCC held that the Common Carrier Bureau was correct in its decision to dismiss a PLMS application, *inter alia*, for failure to demonstrate a public need for a proposed service.). Though this showing is no longer explicitly required in an

application, it is still *implicitly* required for all Part 22 license applications, and expressly required under the Act. The FCC should revise its rules to reinvigorate this statutory requirement and deter speculative applications.

B. Disclosure of Real Parties-In-Interest.

From Metrocall's experience with speculative paging applications, many of them have raised questions concerning the real parties in interest behind those applications. Common engineering and "consultants", common antenna sites, and the applicant's obvious lack of familiarity with the paging business in general and the FCC's Rules in particular, have raised questions about whether these applicants have been perhaps unwitting "fronts" for other parties, or, have essentially ceded control of their applications to an application mill. The FCC could deter some speculators simply by requiring shared frequency applicants to make more detailed disclosures concerning the "real parties in interest" behind their applications. Although there is already such a Part 90 Rule, see, 47 C.F.R. § 90.123(a), it does not appear to be one that is routinely honored by most Part 90 applicants, or enforced by the FCC.

The Commission has stated that "[t]he test to determine whether a third party is an undisclosed real party-in-interest is whether the third party has an ownership interest in the application or will be in a position to actually or potentially control operation of the facility." See David L. Block, 2 FCC Rcd 5978, 5980 (Mob. Serv. Div. 1987) (cite omitted). One important factor the FCC has employed in this determination is whether the undisclosed party in question has a "pervasive role" in the preparation and prosecution of the application. Id.

Evidently, some "application mills" have had such a "pervasive role" in preparing paging applications for the past two to three years. More detailed FCC disclosure requirements

concerning the identities of those "consultants" might deter application mills from filing speculative shared frequency applications. The additional burden to *bona fide* applicants should not be great, since they presumably use either in-house resources, or legitimate professional assistance, to routinely prepare their shared frequency applications.

C. The FCC Should Enforce Public Interest Statement Requirements.

Some FCC rule requirements seem so routine as to warrant little respect or attention by legitimate applicants; however, they serve an important regulatory purpose when this agency accords them due respect. For instance, the perhaps boilerplate "public interest statement" that is required under Part 22 of the FCC's Rules, serves an important role of flagging for the FCC's attention the applicant's qualifications to hold an authorization. See 47 C.F.R. § 22.108.

If the FCC had aggressively enforced its public interest/licensee qualifications rules in the recent past, it might have ferreted out many speculative filers right away. Many speculative Part 22 applications failed to include *any* public interest statements, and contained absolutely no discussion of the applicant's qualifications to hold an FCC license; yet, those applications were processed and many were granted. If the FCC had sent "defect" letters to each speculative applicant, requiring additional qualifying information, it might have had grounds to dismiss those applications without further processing. Those applicants would then have been in a better position to demand a refund from their respective application mills. Instead, by processing these speculative applications, the FCC did no one any favors: the application mills got paid exorbitant fees for routine FCC applications, legitimate applicants found their applications "blocked" by speculators, and speculators lost all or most of their paging "investments". The FCC could avoid this mistake in the future by simply enforcing some of its existing rules, such

as the licensee qualification rules, more aggressively than it has in the past.

D. Financial Qualification Requirements.

It is now apparent that most of the Part 22 paging speculators had no intention of financing, constructing, or operating their proposed paging systems; rather, most of those applicants hoped to "sell" an FCC license for a profit. Although the FCC eliminated the express "financial showing" requirement for paging stations many years ago, financial ability remains an implicit obligation for anyone that applies for a paging license. The FCC ought to consider once again either making "financial qualifications" an explicit obligation for all paging applicants, or, to routinely ask for that information if other aspects of a paging application send off "warning signals" that an application may be speculative. Again, a simple form letter or "defect letter" would suffice to put some speculative filers on notice about these essential licensee obligations.

The FCC has authority to ask for financial qualification information without revising its rules. Even though financial statements are no longer explicitly required for PMS applications, see Elimination of Financial Qualifications in the Public Mobile Radio Services, 82 FCC 2d 152 (1980), the Commission did not abandon the policy represented by that rule. All PMS applications are still required to have the financial ability to construct and operate a proposed station. See e.g., National Beeper, Inc. 7 FCC Rcd. 3202 (C.C.B. 1992) (Common Carrier Bureau affirmed that the Mobile Services Division was correct in its decision to cancel PLMS licenses for failure to timely construct facilities due to lack of funds).

If the FCC is concerned about the regulatory burdens of reimposing the financial qualification rule, it could simply send out financial qualification inquiries to those applicants who, based on the totality of their applications, do not appear to be *bona fide* paging operators.

If that applicant does not properly respond to those FCC inquiries, the application could be dismissed. See, e.g., 47 C.F.R. § 22.120(d); see also, Dana Communications, Ltd., 69 RR 2d 1178, 1181 (1991) (acceptance of an application for filing merely means that an application has been subject to preliminary review; it does not preclude later dismissal if the application is found to be defective). Once again, the unwitting "speculator" would be better off with dismissal of the application, since he or she could at least turn to the unscrupulous application mill for a "refund."

E. Antenna Site Availability Requirements.

Although most of the paging industry cheered when the FCC eliminated the old Part 22 requirement concerning proof of antenna site availability, it is equally apparent that most of these speculative applicants and their preparers have not made the slightest inquiry into site availability. Rather than imposing proof of site availability requirements on all shared frequency applicants again, the FCC might be able to deter speculative applications by sending site availability inquiries (in the form of a "defect letter") only to those applicants that display speculative warning signs. Or, the FCC could send a standard letter to all applicants, simply asking them to certify under penalty of perjury that they have reasonable assurances of site availability.[3]

The Commission has held that applicants are entirely responsible for the contents of their applications. See, e.g., Lorain Community Broadcasting 18 FCC 2d 686 (1969). In this regard, applicants are required to take "affirmative steps" to obtain reasonable assurance of site availability, including taking reasonable precautions in specifying sites. See Charles Mitchell

---

[3] The requirement that an applicant have reasonable assurance of site availability would not preclude an applicant from subsequently amending its application or seeking a modification of license if the site becomes unavailable to it.

Dant, 3 FCC Rcd 950 (Com. Car. Bur. 1988), aff'g 2 FCC Rcd at 5584 (Mob. Serv. Div. 1987). The Commission has stated that "[a]ny false certifications will be considered a misrepresentation to the Commission and will precipitate remedial action." See Revision and Update of Part 22 of the Public Mobile Radio Service Rules ,CC Docket No. 80-56, 54 RR 2d 1661, 1670 (1983). Sending such reminders to shared frequency applicants might suffice to alert "speculators" that they need to comply with the FCC's Rules, and be responsible for their applications. It might also warn those applicants that their licensing mills may have sold them a bad bill of goods.

F. Application Certification Requirements.

The FNPRM seeks comment on whether application preparation services should be required to sign the FCC Form 600, and to certify that the applicant is familiar with the FCC's rules and licensees' obligations. FNPRM at ¶ 220. Presumably, the Commission is looking for some way to bring "speculation" concerns directly to the applicant's attention, rather than to the attention of an application mill that is more naturally inclined to keep its customers entirely in the dark about FCC requirements. While the FCC's objectives are laudable, Metrocall does not agree that this proposal is a practical or equitable means of weeding out speculative filings.

First of all, if the FCC expands the application certification requirements to include the application "preparer", then all engineering and law firms that are involved in the preparation of FCC applications will be subject to the FCC's Section V of the Communications Act forfeiture provisions, and Title 18 of the U.S. Code's criminal provisions concerning misrepresentations before federal agencies. Rather than face the risk of sanctions or even criminal penalties for possible misstatements of fact made by the applicant (the preparer typically incorporates into the application whatever responses the applicant provides), legitimate communications consultants

and law firms will probably elect to avoid altogether any involvement in the application process. In essence, expanded certification requirements will drive a wedge between legitimate applicants and their consultants, forcing applicants to master the FCC's Rules and application procedures on their own, thereby penalizing *bona fide* applicants for the acts of speculators. That is simply a bad public policy.

On the other hand, application mills could avoid FCC liability simply by "ghostwriting" FCC applications for someone else. Even if the application mill deigned to sign an application, it is by no means apparent that this expanded certification proposal would be an effective deterrent to speculative filings. The application mill that has no shame in charging thousands of dollars for preparing one FCC Form 600, presumably would have no qualms about telling the FCC that they have indeed "informed the applicant about the FCC's rules and requirements." It is difficult to imagine that the FCC would have the resources or inclination to institute forfeiture or revocation proceedings to determine whether or not those certifications are true. Moreover, the FCC should recall that many application mills were not shy about listing themselves as "contact representatives" on speculative Part 22 applications. So, shining the regulatory light on the application preparer, by expanding the certification requirements, would not even indirectly solve the problem of speculative filings.

Metrocall has already suggested more direct approaches to ensure that an applicant is familiar with the FCC's basic qualification and operations requirements. The FCC could routinely send out a standard "deficiency" or "response" letter to any or all shared frequency applicants, requiring responses concerning the applicant's basic qualification requirements and intentions to build and operate a paging station. Since the FCC's letter would be sent directly to

the applicant, rather than to the "contact representative", there would be greater assurances that the application mills could not intercept, purloin or destroy this pertinent information from the FCC. This approach, direct communications between the FCC and the possibly unwitting applicant, seems to be the only way to ensure that all applicants are familiar with the FCC's Rules and operating requirements.

VI. Partitioning and Disaggregation.

A. Partitioning by Nationwide Licensees.

The FNPRM seeks comment on whether nationwide licensees should be permitted to partition their service areas, and if so, the coverage requirements that would apply to partitionees. See, FNPRM at ¶¶ 203, 209.

Nationwide licensees should be permitted to partition their licenses in the same manner as other licensees. The goals of partitioning include permitting licensees flexibility to provide "the most suitable services" in response to marketplace forces, and encouraging a wide variety of service providers, including small businesses, to participate in the provision of telecommunications services, see Second Report and Order at ¶ 192; those goals are served equally well regardless of whether the partitionee acquires its license from a nationwide, MTA or EA licensee. Indeed, the FNPRM notes the benefits of flexibility of service offerings attendant to partitioning. See FNPRM at ¶ 204. It should not be decisionally significant that nationwide licensees are not required to bid for their nationwide licenses. See, FNPRM at ¶ 203. As previously stated, those licensees have incurred costs, and met coverage requirements, that are at least comparable to those that may be incurred by MTA/EA licensees. Moreover, the FCC's Rules already provide for incumbent paging licensees to partially assign their licenses, see

47 C.F.R. §§ 22.137(c) and 90.153(c); partitioning is analytically indistinguishable from partial assignments. As incumbent paging licensees, nationwide licensees should not be deprived of the flexibility accorded to other existing paging licensees, and to future paging licensees. See, *e.g.*, Garrett v. FCC, *supra*.

Metrocall agrees with the Commission that some coverage requirements for partitionees are advisable, to ensure that partitioned service areas do not lie fallow. Coverage requirements for partitionees of nationwide licenses should be the same as the coverage requirements for MTA/EA licensees; *i.e.*, to one-third of the population of the partitioned service area within three years of grant, and to two-thirds of that population within five years.

B. Coverage and Payment Requirements for Partitioned Licenses.

As proposed in Paragraph 209 of the FNPRM, partitionees should be subject to coverage requirements for their partitioned areas.[4] Since the partitionee of an MTA/EA license during the five-year build out period is analogous to the assignee of a construction permit, Metrocall generally supports the Commission's proposal to hold partitionees to the MTA/EA licensee's benchmarks.

Nonetheless, those requirements should take into account the amount of time in which the partitionee has held a license for the partitioned service area, if the grant of partitioning arrangement is received close to one of the benchmarks due to no fault of the parties (for

---

[4] For purposes of this discussion, Metrocall is assuming that the partitionee is not an incumbent paging operator on the relevant channel in a substantial part of the partitioned service area. If an incumbent/partitionee already meets the coverage benchmarks for the area in question, it should be permitted to so certify in the application requesting FCC consent to the partitioning agreement. Moreover, such incumbent/partitionees should not have any liability for any bid payments due by the MTA/EA licensee.